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OCTOBER TERM, 1967

No. 1041

THE WESTERN PACIFIC RAILROAD COMPANY, and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated, *Petitioners,*

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board; SAMUEL CHMELL, individually and as Director, Bureau of Unemployment and Sickness Insurance of said Board; DEAN W. STODDARD, individually and as Chief, Division of Claims Operations of said Board; and H. H. DASHIELL, Director, Atlanta Region; JOHN J. FINNERTY, Director, New York Region; FRANK J. SHEA, Director, Cleveland Region; CHARLES L. HOLLER, Director, Chicago Region; RAYMOND W. LUSK, Director, Dallas Region; WILLIAM R. CALWELL, Director, Kansas City Region; WALTER J. MACKLIN, Director, San Francisco Region, each individually and as Directors of said Regions under said Board, *Respondents.*

Petitioners' Reply Brief

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The petition for certiorari essentially presents two questions: whether Congress, even if it wished, could constitutionally pro-

hibit all judicial control over agency action which is in excess of statutory power and which substantially and adversely affects the interests of those seeking judicial review; and whether, in the light of these constitutional questions, an intent to forbid all judicial review whatever of the Board's actions should nevertheless be attributed to Congress. (Pet. 2-3, 11-24).

Respondents' brief deals with the latter question not at all and with the former only obliquely, and in a manner which obscures, rather than illuminates, the constitutional issues which lie at the heart of the case. (Br. in Opp. 7-9).

Respondents do agree that the Court of Appeals has read the statute as precluding all judicial review whatever of the granting by the Board of claims for benefits. (Br. in Opp. 5 and Note 4). Respondents also apparently agree—for they make no argument to the contrary—that a Federal official may not constitutionally be made the final judge of his own powers, and that, where substantial interests are adversely affected by administrative action, judicial review, at some time, is compelled by the Constitution. (Br. in Opp. 8).

What position, then, do respondents take? Though as yet unclear in its contours, respondents' contention seems to run along these lines: that petitioners' interest in preventing the unlawful waste of the Account is supposedly not "substantial" enough to outweigh the "deference" owed by the courts to the decisions of administrative tribunals. (Br. in Opp. 7-9).

The point first mustered in support of this suggestion is that petitioners "were not parties" to the Board proceedings. Indeed they were not, for respondents gave them neither notice nor an opportunity to be heard. (R.V. 2, pp. 18-20). But how do such facts advance respondents' argument? It can hardly be contended that, because one was not permitted to be heard in connection

with the making of an agency decision, he therefore has no right to complain concerning its effects upon him.

Respondents say next that petitioners "have no property interest" in the Account. Of course petitioners do not "own" the Account or the sums which it may contain; but it obviously does not follow that petitioners have no interest in the legality of the disbursements which respondents make from the Account. Petitioners and the class of 775 railroads which they represent contribute more than 85% of all amounts paid into the Account, and it is they and the other railroad employers who must, of necessity, replace every dollar which is disbursed from the Account. Though administered by the Board, the Account, in an economic sense, is essentially a private fund maintained by the railroads for the benefit of their own employees.* It cannot rationally be maintained that the railroads have no substantial interest in maintaining the integrity of such a fund or in preventing its unlawful dissipation.

Finally, respondents argue that, because it cannot be predicted with certainty *when* (as opposed to *whether*) the railroads will feel the bite of the Board's unlawful disbursements, petitioners' interests are too remote to be justiciable. Yet, respondents fail to explain why, if this were so, even an ordinary State, territorial or municipal taxpayer may challenge illegal expenditures when there is obviously no certainty when—or indeed by whom—the sums expended will be replaced by way of future taxes. See *Cole-*

*See the Hearings before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare on S. 360, S. 945, S. 1313, S. 1630 and S. 1651, 85th Cong., 1st Sess., p. 201, where Senator Morse remarked, with respect to the Railroad Unemployment Insurance Account:

> "We are dealing here really with private funds. The best you can say is that there is simply a quasi-public obligation with respect to those funds.
>
> . . . . .
>
> "This is not a case where we are dealing with public funds, except in terms of the Federal Government's trusteeship obligations."

man v. Miller, 307 U.S. 433, 445-46 (1939); *Reynolds v. Wade*, 249 F.2d 73, 76 (9th Cir. 1957); *cf. Stark v. Wickard*, 321 U.S. 288 (1944).*

Thus, there is nothing to respondents' contention that petitioners have no substantial interest in preventing the unlawful waste of the Account. Moreover, if petitioners cannot challenge respondents' actions, plainly no one can. The necessary implication of respondents' argument, then, is that neither this nor any other Court can ever have power to restrain the actions of the Board, no matter how unlawful or improper they may be, and that the Board will therefore be made the sole and final arbiter of its own jurisdiction. It is this remarkable conclusion which respondents necessarily ask this Court to adopt when they request that certiorari be denied.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945), upon which respondents appear to rely is not in point. In *Gange* the total amount involved was only $460.50, and this Court therefore felt that any conceivable tax burden to a general taxpayer of the State of Washington might well be "infinitesimal." 326 U.S. at 304. Even when so little was at stake, the ruling in *Gange* has been called "one of the most extreme decisions in the entire law of standing. . . ." 3 Davis, *Administrative Law Treatise*, § 22.13, p. 271. Clearly, the reasoning of the *Gange* decision can hardly be applied to the present situation, where the challenged expenditures have already totalled more than $2,500,000.